

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD O. PATTERSON,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DE0752910503I1

DATE: FEB 13 1992

Richard O. Patterson, Park City, Utah, pro se.

Jeffrey B. Killeen, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

Both the appellant and the agency have filed petitions for review of an initial decision, issued November 6, 1991, that dismissed the appellant's appeal for lack of jurisdiction. For the reasons discussed below, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We GRANT the agency's petition under 5 U.S.C. § 7701(e), and AFFIRM the initial decision as MODIFIED, still DISMISSING the appellant's appeal for lack of jurisdiction.

BACKGROUND

The appellant worked for the Federal Bureau of Investigation (FBI) as a GS-9 Special Operations Assistant in Salt Lake City, Utah. On September 14, 1991, he filed a petition for appeal with the Board's Denver Regional Office, alleging that the FBI had improperly removed him. He also stated that he had resigned from his position. He indicated that the effective date of the action was June 7, 1991. See Initial Appeal File (IAF), Tab 1.

The appellant did not respond to the administrative judge's order to submit evidence and argument concerning the Board's jurisdiction over his appeal and the timeliness of his appeal. However, the agency moved to dismiss the appeal on the basis that the appellant was not an "employee" under 5 U.S.C. § 7511(a)(1). Although the administrative judge rejected the agency's argument, she concluded that the appellant's petition must be dismissed because the matters he raised were not appealable to the Board.

The administrative judge acknowledged the appellant's argument that his proposed reassignment to an unspecified position was tantamount to a removal. She found, however, that the appellant failed to show that any reassignment that occurred was within the Board's jurisdiction because he did not assert that it resulted in a loss of grade or pay. She also noted that the appellant, who resigned from his position, failed to allege that his resignation was coerced and thus was an involuntary action within the Board's jurisdiction.

Because she found that the appellant did not raise an otherwise appealable matter, the administrative judge further found that the appellant's allegation of age discrimination did not confer jurisdiction on the Board.

The administrative judge acknowledged the appellant's assertion that his proposed reassignment resulted from his protected disclosures. She found, however, that under 5 U.S.C.A. § 2303, any appeal or complaint in this regard by an employee of the FBI must be processed through the Attorney General. Thus, she found that the appellant's allegation did not bring the matter within the Board's jurisdiction.¹

ANALYSIS

The agency's sole contention in its petition for review is that the administrative judge erred in finding that the appellant was an "employee" entitled to appeal an adverse action to the Board. We agree.

The administrative judge cited 5 U.S.C.A. § 7511(a)(1)(C) (West Supp. 1991) for the proposition that an excepted service non-preference eligible employee with two years of current continuous service in the same or similar position may appeal an adverse action to the Board. However, 5 U.S.C.A. § 7511(b)(8) (West Supp. 1991) specifically provides that the subchapter does not apply to a non-preference eligible

¹ Because she found that the Board lacked jurisdiction, the administrative judge found it unnecessary to address the apparent untimeliness of the appellant's appeal. See Initial Decision at 5.

employee whose position is within the FBI. See also H.R. Rep. No. 328, 101st Cong., 2d Sess. 5, reprinted in 1990 U.S. Code Cong. & Admin. News 695, 699.

The appellant has submitted no evidence to show that he is a preference eligible; in fact, he stated in his petition for appeal that he is not. See IAF, Tab 1; see also IAF, Tab 3, Exhibits 3 and 4. Thus, the appellant would not have a right to appeal a removal to the Board, even if he had been subjected to one.

Under certain circumstances, an appellant who has not suffered an otherwise appealable action may bring an individual right of action appeal to the Board under the provisions of the Whistleblower Protection Act of 1989. However, the appellant in this case could not bring such an appeal because the FBI is not an agency covered by 5 U.S.C. § 2302(a)(2)(C). See IAF, Tab 1 (August 27, 1991 letter from Ralph B. Eddy, Assistant Special Counsel); cf. *Mack v. U.S. Postal Service*, 48 M.S.P.R. 617, 620-21 (1991) (because the Postal Service is not a covered "agency" under 5 U.S.C. § 2302(a)(2)(C), an employee of the Postal Service cannot be subjected to a "personnel action" constituting a "prohibited personnel practice"). Finally, as the administrative judge pointed out, employees of the FBI who allege prohibited personnel practices are covered by a separate statutory section. This section does not provide for appeal rights to the Board. See 5 U.S.C. § 2303. Thus, the appellant's

whistleblowing allegations could not be considered as an individual right of action appeal.²

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than

² Because the Board lacks jurisdiction over the appellant's appeal as either an action otherwise appealable to the Board or an individual right of action under the Whistleblower Protection Act, we cannot consider his further assertion that the agency erred in ordering him to undergo a psychiatric fitness for duty evaluation. See, e.g., *Moore v. Department of State*, 15 M.S.P.R. 488, 489-90 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985) (Table).

30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board